IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.11.2006

CORAM:

THE HONOURABLE MR.JUSTICE A.KULASEKARAN

SA.No.1640/2001
CMP.No.17388/2001

Karuppanna Gounder — Appellant(2nd Defendant)

Vs.

Rasammal — Respondent (Plaintiff)

Prayer:- This Second Appeal is filed under Section 100 of Civil procedure Code against the judgement and decree dated, 25.6.2001, made in AS.No.91/99, on the file of the II Additional Subordinate Judge, Gobichettipalayam, reversing the judgement and decree made in OS.No.50/93, dated 13.6.1996, on the file of the District Munsif Court, Gobichettipalayam.

For Appellant : Mr.R.T.Duraisamy

For Respondent : Mr.A.K.Kumarasamy

JUDGEMENT

1.This Second Appeal is not admitted. After notice ordered by this court, this Second Appeal came up today for admission.

2.The 2nd Defendant, who lost his case before lower Appellate Court, but succeeded before the Trial Court, is the Appellant in this second appeal.

3.For the purpose of convenience, the parties are referred to as they were arrayed in the suit before the Trial Court.

4.The Plaintiff, who is the Respondent herein, filed the suit in OS.No.50/1993, before the District Munsif Court, Gobichettipalayam, praying (1) to permit the Plaintiff to sue as an indigent person, (2) to direct the 2nd Defendant to pay a sum of Rs.500/- p.m. towards maintenance by creating a charge over the suit property and (3) to direct the 2nd Defendant to pay the the arrears of maintenance with a charge over the suit property and the court fee payable on the plaint to the Government and other costs and the

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said suit was dismissed. The appeal filed by the Plaintiff in AS.No.91/1999 before the II Additional Subordinate Judge, Gobichettipalayam was allowed, setting aside Judgement and Decree of the Trial Court. Aggrieved by the same, this second appeal has been filed by the 2nd Defendant.

5. The case of the Plaintiff as set out in the plaint is as follows:- The suit property is located in Nagadevampalayam Village. The 2nd Defendant is the maternal uncle of the 1st Defendant. The Plaintiff is the wife of the 1st Defendant, whose marriage was performed in Mariamman Temple, according to Hindu Rites and Customs. The 1st Defendant harassed the Plaintiff by demanding dowry from her. The mother of the 1st Defendant Pavayi, also harassed the Plaintiff by demanding dowry. The 1st Defendant beat the Plaintiff and drove her from the matrimonial home after taking three sovereigns of gold chain, 3/4 sovereign of ear screw and one sovereign of Thali from her, five months prior to the filing of the suit. The Plaintiff was unable to maintain herself and her son and hence, demanded maintenance of a sum of Rs.500/- p.m. The Plaintiff came to know that the 1st Defendant was taking steps to alienate the suit property and if he was permitted to alienate the suit property, she would not be in a position to recover any amount from him, hence, she issued a notice dated 8.9.1992 to the 1st Defendant, which was received by him, but, he did not choose to give any reply. Thereafter, the Plaintiff filed the suit on 22.10.1992. On 4.12.1992, the Plaintiff also issued a notice to the 2nd Defendant, which was returned as refused. On 11.12.1992, the 1st Defendant sold the suit property to an extent of 14 cents to the 2nd Defendant under the sale deed dated 11.12.1992 for a total sale consideration of Rs.29,000/-. The Plaintiff also issued another notice to the 2nd Defendant dated 9.6.1994, informing that the suit was filed, which was admittedly received by the 2nd Defendant, but he did not choose to give any reply. Pending the suit, the 1st Defendant died on 16.2.1994.

6. The case of the 2nd Defendant was that the 1st Defendant and the Plaintiff were living together; that the 1st Defendant was always seeking the advise of the Plaintiff; that the averments that the 1st Defendant demanded dowry, harassed her and drove her from the matrimonial home were false; that no action had been initiated by the Plaintiff against the 1st Defendant prior to the filing of the suit; that the Plaintiff was carrying on vegetable business and earning Rs.1,000/- p.m; that her minor son was also employed in a shop, who was also earning a sum of Rs.750/- p.m.; that the suit property was sold to him to discharge the Bank Loan and the Private Loan borrowed by first defendant from two persons and he was a bona fide purchaser of the suit property for a valid sale consideration.

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7. Before the Trial Court, the Plaintiff marked Ex.A1, dated 8.9.1992, notice issued by her counsel to the 1st Defendant, Ex.A2, dated 4.12.1992, notice sent by her counsel to the 2nd Defendant, Ex.A3, intimation sent by the Postal Department that the 2nd Defendant refused to receive the said notice, Ex.A4 dated 11.12.1992, sale deed executed by the 1st Defendant in favour of the 2nd Defendant, Ex.A5, dated 9.6.1994, lawyer's notice issued by the Plaintiff to the 1st Defendant, Ex.A6, acknowledgement of Ex.A5 and Ex.A7, the suit filed in OS.No.536/1994 and examined herself as PW.1 and one Marappan as PW.2 and the 2nd Defendant marked Ex.B1, dated 12.12.1992, receipt issued by one Parameswaran to the 2nd Defendant, Ex.B2 dated 12.12.1992, receipt issued by one Pongiagounder to the 2nd Defendant, Ex.B3, dated 11.12.1992 is equivalent to Ex.A4 and Exs.B4 and B5, documents relating to the loan availed by the 1st Defendant from the Indian Overseas Bank and examined himself as DW.1, one Parameswaran as DW.2, one Rajendran as DW.3 and one Palanipandaram as DW.4.

8. The trial court, after considering the oral and documentary evidence, came to the conclusion that the 2nd Defendant was the bona fide purchaser of the suit property for a valid sale consideration; that the suit property was sold for the legal necessity of discharging the loans borrowed by the 1st Defendant for his family necessity; that Exs.B1, B2, B4 and B5 also proved that the loans borrowed by the 1st Defendant was discharged by the 2nd Defendant; that the evidence of Dws.2 to 4 also support the case of the 2nd Defendant that he discharged the loans; that out of legal necessity, the suit property was sold by the 1st Defendant to the 2nd Defendant and ultimately, dismissed the suit.

9. The lower Appellate Court, after considering the oral and documentary evidence, came to the conclusion that the Plaintiff issued Ex.A1, 8.9.1992 to the 1st Defendant, calling upon him to pay the maintenance; that thereafter the suit was filed on 22.10.1992 and Ex.A2 dated 4.12.1992 was sent by the Plaintiff to the 2nd Defendant, calling upon him not to purchase the suit property, since she had filed the suit against her husband but the same was returned as refused; that Ex.A4 sale deed dated 11.12.1992 was executed by the 1st Defendant in favour of the 2nd Defendant for a total consideration of Rs.29,000/-, thereby about 14 cents of land was alienated; that Ex.A5 dated 9.6.1994, another notice was issued by the Plaintiff to the 2nd Defendant and the 2nd Defendant which was received by him but has not chosen to give any reply. Knowing well that the suit was filed by the Plaintiff against the 1st Defendant for maintenance and sought charge over the suit property; that non receipt of notice under Ex.A2 disclose that the 2nd Defendant was not a bona fide purchaser; that in cross examination, to a question put to the 2nd Defendant as to whether

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the suit property was worth about Rs.3 lakhs, he replied that he was not aware of the value; that the 2nd Defendant did not even dispute the value or the said quantum of Rs.3 lakhs. Considering the above said facts and applying Section 52 of the Transfer of Property Act, the lower Appellate Court ultimately allowed the appeal, holding that the 2nd Defendant was not the bona fide purchaser of the suit property and that the alleged legal necessity was false, setting aside Judgement and Decree of the Trial Court.

10.The learned counsel for the Appellant/2nd Defendant has submitted that the 1st Defendant sold the suit property to the 2nd Defendant herein to discharge the loans borrowed for the family necessity which were also discharged by the appellant, which is evident from Exs.B1, B2, B4 and B5 and the evidence of Dws.2 to 4; that considering the said fact, the Trial Court dismissed the suit, whereas the lower Appellate Court without proper consideration of the said oral and documentary evidence erroneously set aside the well considered Judgement and Decree of the Trial Court and hence, prayed for setting aside the Judgement and Decree of the lower Appellate Court.

11.The learned counsel for the Respondent herein/Plaintiff has submitted that Ex.A1 notice issued by the Plaintiff to her husband, 1st Defendant, calling upon him to pay the maintenance discloses that she was not taken care by him; that Ex.A2 notice issued to the 2nd Defendant also discloses that she informed about the filing of the suit for maintenance and requested him not to purchase the suit property and the said notice was returned by the 2nd Defendant and the reason for returning the said notice is also not explained; that the 2nd Defendant is none other than the maternel uncle of 1st Defendant, who was fully aware of the strained relationship between the Plaintiff and the 1st Defendant and also the suit filed by the Plaintiff against the 1st Defendant; that the averment that the loan borrowed from two private persons was a cooked up one for the purpose of the case to defeat the right of the Plaintiff; that the above said aspects were not considered by the Trial Court, but the lower Appellate Court, considering the said aspects, rightly set aside the Judgement and Decree of the Trial Court and hence, prayed for dismissal of this Second Appeal.

12.This court carefully considered the arguments of the learned counsel on either side and perused the material records placed.

13.It is not in dispute that even prior to the filing of the suit, the Plaintiff issued Ex.A1 dated 8.8.1992 to her husband, 1st Defendant, calling upon him to pay the monthly maintenance. Thereafter, the suit was filed on 22.10.1992, seeking a charge over the suit property. Ex.A2 dated 4.12.1992 was issued by the Plaintiff herein to the 2nd Defendant, mentioning the details of

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the suit as well as the misunderstanding between her and her husband. The 2nd Defendant refused to receive the said notice, for which, no valid reason has been assigned. The suit property was sold by the 1st Defendant in favour of 2nd Defendant under Ex.A4 dated 11.12.1992. The reason for selling the property under Ex.A4 was to discharge the loans borrowed by the 1st Defendant for his family necessity. In support of the said contention, the 2nd Defendant herein relied upon Exs.B1, B2, B4 and B5 to show that the loans were borrowed, which were discharged by the 2nd Defendant by adjusting towards the sale consideration. In cross examination, to a question put to the 2nd Defendant as to whether the suit property was worth at Rs.3 lakhs and it was purchased by him for meagre amount, he replied that he was not aware of the value at all. It is to be remembered that the 2nd Defendant is none other than the maternal uncle of the 1st Defendant, who was fully aware of the strained relationship between the Plaintiff and the 1st Defendant. In this context, it is necessary to refer to the notice under Ex.A2, which was returned by the 2nd Defendant without any valid reason. Even in his Written Statement, he did not give any valid explanation for refusing to receive the said notice. Considering the above said facts and also the oral and documentary evidence, the lower Appellate Court, applying Section 52 of the Transfer of Property Act, rightly set aside the Judgement and Decree of the Trial Court.

14.Now, we look into the provisions of Section 52 of the Transfer of Property Act, which runs as follows:-

> "52. Transfer of Property pending suit relating thereto - During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.
>
> Explanation - For the purpose of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of

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competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.

15.Ordinarily, a suit by Hindu wife for maintenance against her husband is a personal suit and any purchaser of the family property during the pendency of the suit is not affected by the rule of *lis pendence.* But where in a suit for maintenance the widow claims that her maintenance should be made a charge on the property, this section applies and any alienation of property made during the pendency of such suit is affected by the rule of *lis pendence.* In this context, it would be relevant to refer to the decision of a single Judge of this Court reported in (Ramaswamy Gounder and another vs. Baghvammal and others) AIR 1967 Madras 457, wherein in Para No.8, it was held thus:-

> "8. ....Apart from that, the argument of Mr. Ramamurthi Iyer overlooks the effect of S.39 which is that if an alienation is made of the husband's property with notice of the right of his wife to maintenance, the alienation will not affect her right in any way. In other words, she can proceed against the alienated property as if it had not been alienated to the extent necessary. If that were so, nothing stands in the way of the Court creating a charge over the alienated properties. I hold, therefore, that the courts below were right in their view that it was open to them to create a charge over the alienated properties in favour of the plaintiff for her maintenance."

16.In view of the above discussion, this court do not find any infirmity or illegality in the findings of the lower Appellate Court, warranting interference by this court or besides, any question of law, much less a substantial question of law involved in this second appeal.

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17.In the result, this second appeal fails and the same is dismissed. The Judgement and Decree of the lower Appellate Court is confirmed and the Judgement and Decree of the trial court is set aside. No costs. Consequently, the connected CMP is closed.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To:

1.The II Additional Subordinate Judge, Gobichettipalayam (with records if any)
2.The District Munsif Court, Gobichettipalayam.
3.The Record Keeper, VR Section, High Court, Madras

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